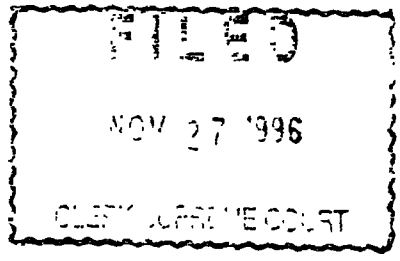
IN THE COURT OF APPEALS OF IOWA

No. 6-517 / 95-1364



JOSEPH W. PRESTON,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Joseph Preston appeals from a denial of his application for postconviction relief which challenged his second-degree sexual abuse conviction. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas S. Mullin, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Cady, P.J., Huitink, and Streit, JJ.

CADY, P.J.

This appeal is from an order by the district court denying a petition for postconviction relief. We affirm the district court on our review.

Joseph Preston was convicted following a trial of second-degree sexual abuse. The victim was a ten-year old girl. The offense occurred on or about May 6, 1992. Preston was sentenced to an indeterminate term of imprisonment. An appeal was affirmed by the Iowa Supreme Court.

Preston subsequently sought postconviction relief. He claimed his trial counsel was ineffective for failing to depose the victim's mother after Preston informed trial counsel of a possible alibi defense. Preston believed the victim's mother would have knowledge of the specific date of the offense, which would enhance his alibi defense. Preston also believed the mother would offer testimony to credibly explain the medical evidence presented at trial concerning injuries to the victim's hymen.

Our standard of review is to evaluate the claim based on the totality of the circumstances. *State v. Wissing,* 528 N.W.2d 561, 563 (Iowa 1995). To prevail on a claim of ineffective assistance of council, the applicant must prove by a preponderance of evidence his counsel failed to perform an essential duty and the failure resulted in prejudice. *Id.* at 563-64.

We initially observe Preston failed to raise his claim of ineffective assistance of counsel on direct appeal, and has failed to allege any reasons for the omission.

Iowa Code section 822.8 (1993); *Collins v. State*, 477 N.W.2d 374, 376-77 (Iowa 1991). Consequently, his claim is barred.

Notwithstanding, his claim is also rejected on the merits. Preston did not offer any evidence at the postconviction hearing from the victim's mother to confirm she was capable of supporting the alibi defense or explaining the injuries to the victim. Based on our review of all the circumstances of this case, Preston's claims are speculative and insufficient to establish prejudice.

AFFIRMED.